U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: AUG 12 2005
EAC 03 015 50834

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be sustained and the petition will be approved.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a research associate at the University of Virginia (UV). The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The

burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

In addition to copies of his educational credentials and published work, the petitioner submits several witness letters that contain descriptions of his work [redacted] ssociate professor at UV's Department of Computer Science, states:

> The project "Scalable Services for the Global Network," in which [the petitioner] is significantly involved, is aimed at an advanced understanding of the process of network infrastructure, in particular the extensibility and scalability of networks. The impact of this research will be to provide the theoretical underpinnings, basic architecture, and a prototype implementation for communication within the global Internet of the 21st century.
>
> The emergence of new computer applications has fostered a number of attempts to increase the functionality of the minimalist Internet core. However, the adoption of enhancements to the Internet has been slow, failed entirely, or been limited to special-purpose private networks. . . . Computer networks . . . were not designed to be extended to the Internet (extensibility). Further, a linkage of local networks with the Internet often requires that vast amounts of information be managed in the core network infrastructure, thus creating bottlenecks (scalability). . . .
>
> [O]ur ultimate goal is to develop truly scalable services for each of the three fundamental components of the Internet's infrastructure: information communication, replication, and storage. . . . [W]e propose to develop: scalable performance-predictable communication; scalable multicast for efficient data dissemination; scalable storage for next generation information services; and design principles for scalable services.
>
> Specifically, [the petitioner's] part of the effort is to develop a new network architecture. In so doing, [the petitioner] has actually created two new terms which will be useful in describing his work. The first term is "q-nodes" which stands for quality-of-service nodes. . . . [The petitioner] is designing a conceptual construct which encompasses Core Routers and Edge Routers. The Edge Routers, whose function will be to increase the quality of network Internet interconnectivity, will be placed in the system at "q-nodes." The process of determining where in the network system these q-nodes are to be placed is called

"geonodality," another term which [the petitioner] coined. [The petitioner's] anticipated successful conclusion of this research will provide optimum solutions to increasing the capacity and functionality of the Internet as a tool for networks as well as individuals.

Since joining my group in March 2000, [the petitioner] has contributed substantially to a series of our new findings and discoveries. He is the first researcher to develop a congestion control mechanism for networks utilizing . . . binary feedback as the control mechanism [which] is far simpler than the current system which uses packet degradation as the control mechanism.

[The petitioner] first established as well what he calls the "fairness principle" to allocate limited bandwidth among "greedy" and "generous" applications so that they can run in parallel and in tandem. [The petitioner] was also the first to propose a new kind of optimizing algorithm to improve distribution of system resources in this newly-developed system. Each application dynamically adapts its sending rate as a result of systematic feedback to achieve a fair share of resources allocation.

Professor Geoffrey Charles Fox of Indiana University states:

In my opinion . . . [the petitioner's] research will very much further our national interest because it relates to next-generation multiservice networks, a research area which has becomes [sic] extremely important in recent years since it represents both an answer to the current bottleneck in internet interconnectivity and the best hope of making the next generation of internet uses truly functional. . . .

[The petitioner's] research involves highly complex mathematical schemes to allocate resources on the Internet among all users in a way which is fairest to each of them. In addition, he is designing on and off ramps for the Internet which allows the various users to take advantage of the internet with the least use of internal fuel (which we call resources). . . .

[The petitioner's] significant role in his current research project . . . is demonstrated by his sole responsibility for the statistical study of the multiplexing flow. This is a critical aspect of the research. . . . [The petitioner] is able to apply a theoretical construct to an operational problem, thus developing novel approaches and helpful solutions.

[The petitioner's] contributions to application layer multicast research have been significant. . . . [The petitioner's] research has explained and demonstrated, for the first time, how to build a distributed system with optimized servers and routers. These are extremely important contributions to this field.

Professor [redacted] of the University of Alabama at Birmingham states:

[The petitioner's] scientific findings relating to network traffic engineering are both original and important to our understanding of network interaction. In particular, [the petitioner's] creation of his Primary Path First theory is a remarkable research accomplishment and a very important contribution to the field of computer science.

[redacted], associate professor at Rice University, states that the petitioner's "expertise allows him to contribute substantially to this project in a way that minimally qualified researchers cannot contribute."

The director instructed the petitioner to submit further evidence to meet the guidelines set forth in *Matter of New York State Dept. of Transportation*. In response, counsel states "there is now a law suit pending relating to the correctness of *In re Matter of New York State Dept. of Transportation*." To date, that precedent decision has survived each of several challenges in federal court; there has been no judicial finding to invalidate that decision. The filing of a lawsuit does not automatically nullify the precedent decision, and the petitioner has not shown that any judge has issued even a preliminary injunction to temporarily suspend the provisions of *Matter of New York State Dept. of Transportation*.

The petitioner submits additional witness letters. [redacted] associate professor at Purdue University, states that the petitioner's "contributions exceed those of a substantial majority of his colleagues at the same employment level. [redacted] does not discuss the petitioner's work in any detail except to say that the petitioner is "brilliantly" working toward "eliminating the bottlenecks" that slow the transmission of data through the Internet.

Professo[redacted]f the University of California, Irvine, states that the petitioner merits a national interest waiver because he "makes the internet work better by figuring out how and why discrete packets of information slow down during transmittal and how to alleviate this problem."

The director denied the petition, stating: "The record contains no evidence that the beneficiary played a leading part in this research. Further, there is no evidence of how this research was received by the wider scientific community." The director added that publication is routinely expected of researchers, and therefore the publication of the petitioner's findings is not inherently demonstrative of eligibility for a waiver. The director acknowledged the witness letters, but stated that those letters do not show that holding the petitioner to the job offer/labor certification requirement would be adverse to the national interest.

On appeal, the petitioner submits a new letter from Dr. Liebeherr, repeating many of that witness' earlier claims, and a brief from counsel. Much of counsel's brief consists of quotations from previously submitted letters, and discussion of previously submitted exhibits such as the petitioner's published articles. Counsel argues that these materials "clearly demonstrated that [the petitioner] has in the past played a vital role in his research endeavors far above that of a minimally-qualified research associate."

In reviewing the evidence, we cannot ignore that the letters come from a broad spectrum of high-ranking witnesses at many different institutions; the petitioner has not relied predominantly on letters from the UV faculty or his former professors. From the available evidence and information, it appears that this great variety of expert witnesses are aware of the petitioner's work by reputation rather than through personal collaboration with the petitioner. The fact that the petitioner's work is so widely known and praised supports the claim that this work is particularly important in the field, and that therefore the United States would benefit greatly from the petitioner's continued presence and efforts. The director, in denying the petition, does not appear to have given sufficient consideration to these materials.

Counsel, on appeal, again attacks *Matter of New York State Dept. of Transportation*, stating that the precedent decision "is wrongly decided on a number of grounds." The decision is, at this time, a standing, binding precedent, and therefore it cannot reasonably be argued that the director erred by relying upon that decision (indeed, counsel acknowledges as much on page 20 of the brief). The approval of the present petition is not, in any sense, a repudiation of the precedent decision.

In criticizing *Matter of New York State Dept. of Transportation*, counsel states:

> INA § 212(a)(5)(A)(ii) limits the applicability of INA § 212(a)(5)(A), the statutory provision incorporating the labor certification, to second preference aliens of exceptional ability and not "aliens who are members of the profession [sic] holding advanced degrees." These two categories of alien appear in the disjunctive in INA § 213(b)(2), and thus are different categories. INA § 203(b)(2)(B) relates to the waiver of the job offer which [the petitioner] clearly has since he is employed.

Counsel's logic here is not entirely clear. Counsel appears to argue that "the statutory provision incorporating the labor certification" applies only to aliens of exceptional ability, and not to advanced degree professionals. Actually, section 212(a)(5)(A)(ii) of the Act merely specifies that, in certain instances, a United States employer seeking a labor certification may decline to hire a qualified U.S. worker, provided that the alien is *more* qualified for the position. This provision does not come into play in the present proceeding. The reference to "exceptional ability" at section 212(a)(5)(A)(ii)(II) of the Act is, admittedly, confusing because this phrase appears in a completely different context at section 203(b)(2) of the Act. Nothing in section 212(a)(5)(A) of the Act, or its subsections, indicates that the job offer requirement or labor certification process are any different for advanced degree professionals than for aliens of exceptional ability, as those terms are contemplated in section 203(b)(2) of the Act.

The Act contains no section 213(b)(2). It appears that counsel meant to cite section 203(b)(2) of the Act. It is true that "alien of exceptional ability" and "member of the professions holding an advanced degree" are technically distinct classifications, but they are both mentioned in the same paragraph of the Act and draw from a common pool of visa numbers. Indeed, the legislative history proves that the national interest waiver was, originally, available *only* to aliens of exceptional ability, and *not* to advanced degree professionals. Section 302(b)(2)(D) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. 102-232, made the waiver available to advanced degree professionals. Thus, Congress originally did not make the waiver available to advanced degree professionals at all, and when Congress did amend the statute to make the waiver available, Congress did so simply by inserting the word "professions" into an existing sentence in section 203(b)(2)(B)(i); this sentence draws no distinction between the two classifications covered by section 203(b)(2) of the Act. There is nothing in the statute to suggest that the threshold for the national interest waiver is lower, or otherwise different, for professionals than for aliens of exceptional ability.[1] From the construction of the statute, it is clear that aliens of exceptional ability, who offer a substantial prospective benefit to the United States due to their exceptional ability, are nevertheless generally subject to the job offer (and thus labor certification) requirement. The statute, therefore, conclusively proves that substantial prospective benefit to the United States, by itself, is not *prima facie* grounds for a waiver, whether the alien is classified as having exceptional ability, or as a member of the professions holding an advanced degree.

Counsel seems also to suggest that the "job offer requirement" and "labor certification requirement" are two entirely different things. Section 203(b)(2)(A) never mentions labor certification. Instead, it requires that the alien's "services . . . are sought by an employer in the United States." Section 212(a)(5)(A)(i) of the Act ties the job offer requirement to labor certification. 8 C.F.R. § 204.5(k)(4)(i) indicates that aliens of exceptional ability *and* advanced degree professionals are subject to the job offer requirement, which *includes* labor

[1] There exists a limited exception for certain physicians, as set forth in section 203(b)(2)(B)(ii) of the Act, but this does not apply in this proceeding.

certification. Because individual labor certification is inherently connected to a specific job offer, there can be no labor certification without a job offer. The waiver of the job offer requirement is meaningless unless it includes a waiver of labor certification. For immigration purposes, the term "job offer requirement" includes more than an actual offer of employment; there is also labor certification, evidence of ability to pay the alien's wages pursuant to 8 C.F.R. § 204.5(g)(2), and so on. We disagree with counsel's apparent assertion that, because the petitioner is employed, he has already met the job offer requirement.

It does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given field of research, rather than on the merits of the individual alien. That being said, the above testimony, and further testimony in the record, establishes that prominent, independent computer science researchers recognize the significance of this petitioner's research rather than simply the general area of research. The benefit of retaining this alien's services outweighs the national interest that is inherent in the labor certification process. Therefore, on the basis of the evidence submitted, the petitioner has established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

ORDER: The appeal is sustained and the petition is approved.